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No. 09-88

In the Supreme Court of the United States

BILTMORE FOREST BROADCASTING FM, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's challenge to the Federal Communications Commission's award of a radio broadcasting license fell within the exclusive jurisdiction of the District of Columbia Circuit under 47 U.S.C. 402(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 555 F.3d 1375. The opinion of the Court of Federal Claims (Pet. App. 19a-57a) is reported at 80 Fed. Cl. 322.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2009. A petition for rehearing was denied on April 20, 2009 (Pet. App. 58a-60a). The petition for a writ of certiorari was filed on July 20, 2009 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1999, the Federal Communications Commission (FCC or Commission) conducted an auction for a license to construct and operate a radio station in Biltmore Forest, North Carolina. Pet. App. 2a, 20a-21a. Liberty Productions (Liberty) was the highest bidder for the license; petitioner was the second-highest bidder. *Id.* at 3a-4a. To enforce FCC rules relating to diversification of ownership, prospective bidders were required to submit a "family media certification" to allow the FCC to determine whether media interests owned by family members of bidders were "subject to common influence or control." *Id.* at 2a-3a. Petitioner submitted the requisite family media certification before the completion of the auction, but Liberty did not submit its certification until after the auction was over. *Id.* at 2a-4a.

Petitioner filed an administrative protest, arguing that Liberty should have been disqualified because of its failure to timely file a family media certification—a failure that, according to petitioner, could not be cured once the auction had been completed. See *In re Liberty Prods., L.P.*, 16 F.C.C.R. 12,061, 12,068 ¶¶ 14-15 (2001). The FCC rejected that argument, concluding that Liberty's untimely filing did not disqualify it from the auction, and the Commission granted the license to Liberty. *Id.* at 12,070-12,071 ¶ 19; see Pet. App. 5a.

Petitioner appealed the FCC's decision to the D.C. Circuit, but that court affirmed the FCC's ruling, holding that the failure of a bidder to timely file a family media certification did not require disqualification. *Biltmore Forest Broad. FM, Inc.* v. *FCC*, 321 F.3d 155, 160-161 (D.C. Cir. 2003). This Court denied certiorari. 540 U.S. 981 (2003).

2. Petitioner then filed a complaint in the Court of Federal Claims, alleging that the FCC had breached an implied-in-fact contract with it by awarding the Biltmore Forest license to Liberty in violation of the published terms of the auction. Pet. App. 19a-20a. The complaint restated verbatim the first issue presented in petitioner's brief before the D.C. Circuit. *Id.* at 23a.

The Court of Federal Claims granted the government's motion to dismiss. Pet. App. 19a-57a. The court held that petitioner's claims were encompassed by 47 U.S.C. 402(b), which gives the D.C. Circuit jurisdiction to review challenges to FCC licensing decisions. Pet. App. 38a. The court further explained that "the D.C. Circuit's jurisdiction over claims that fall within subsection 402(b) is exclusive." *Id.* at 36a (quoting *Folden* v. *United States*, 379 F.3d 1344, 1356-1357 (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005)). The Court of Federal Claims concluded that petitioner's complaint "directly contest[ed] the FCC's decision to award the license to Liberty * * * thus squarely falling into section 402(b)(6)," and that the court therefore lacked subject-matter jurisdiction to consider petitioner's claims. *Id.* at 38a.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court assumed, without deciding, "that an FCC license auction results in a contract between the FCC and the high bidder." *Id.* at 10a. Nevertheless, the court explained, the Court of Federal Claims lacks jurisdiction over a claim based on such a contract because under 47 U.S.C. 402(b), "the District of Columbia Circuit not only has exclusive jurisdiction to review the grant or denial of FCC licenses, but also has exclusive jurisdiction to adjudicate the underlying issue of FCC rules compliance necessary to the licensing decision." Pet.

App. 12a. The court also noted that petitioner's challenge to the FCC's interpretation of its rules had already been rejected by the D.C. Circuit, and it observed that petitioner "is essentially asking us to re-adjudicate this question and to create inconsistent results for the same question in this court and the District of Columbia Circuit." *Id.* at 14a.

ARGUMENT

Petitioner contends (Pet. 5-14) that the Court of Federal Claims has jurisdiction to consider contract and takings claims premised upon the FCC's alleged violation of Commission rules in conducting an auction to award a broadcast license. The court of appeals correctly rejected that argument, explaining that 47 U.S.C. 402(b) grants the D.C. Circuit exclusive jurisdiction over all challenges to FCC licensing decisions. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Section 402(b) gives the D.C. Circuit jurisdiction over appeals "[b]y any applicant for a * * * station license, whose application is denied by the" FCC, as well as "[b]y any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying" such an application. The court of appeals correctly held that Section 402(b)'s grant of jurisdiction is exclusive. Pet. App. 11a; *Folden* v. *United States*, 379 F.3d 1344, 1356-1357 (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005). The D.C. Circuit has reached the same conclusion, see *Sprint Commc'ns Co.* v. *FCC*, 274 F.3d 549, 552 (2001); *City of Rochester* v. *Bond*, 603 F.2d 927, 934-935 (1979); as has every other court of appeals to consider the question,

see *In re FCC*, 217 F.3d 125, 140 (2d Cir.), cert. denied, 533 U.S. 1029 (2000); *La Voz Radio De La Communidad* v. *FCC*, 223 F.3d 313, 318 (6th Cir. 2000); *Luz* v. *FCC*, 88 F. Supp. 2d 372, 375 (E.D. Pa. 1999), aff'd, 213 F.3d 629 (3d Cir. 2000); *Miller* v. *FCC*, 66 F.3d 1140, 1144 n.3 (11th Cir. 1995), cert. denied, 517 U.S. 1155 (1996); *Cook, Inc.* v. *United States*, 394 F.2d 84, 86 (7th Cir. 1968).

Those holdings are consistent with this Court's interpretation of a prior version of Section 402(b), see *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 208 (1956), and with this Court's interpretation of 47 U.S.C. 402(a), which provides for court of appeals review of all other FCC orders, see *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984). They are also consistent with the legislative history of Section 402(b). See S. Rep. No. 44, 82d Cong., 1st Sess. 11 (1951) ("The language of [Section 402(b)] * * * make[s] it clear that judicial review of all cases involving the exercise of the Commission's radio licensing power is limited to [the D.C. Circuit].").

The decision below accords with the general principle that Congress's creation of a comprehensive statutory scheme, under which certain types of claims are to be litigated in a specific forum, will ordinarily be understood to withdraw the jurisdiction of the Court of Federal Claims over those claims. See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (litigation of Medicare reimbursements is governed by the "precisely drawn provisions" of the Medicare statute rather than the Tucker Act, 28 U.S.C. 1491 *et seq.*); *Brown* v. *GSA*, 425 U.S. 820, 828 n.10, 834-835 (1976) (Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, provides exclusive remedy against the United States for racial discrimination in employment, displacing the Tucker Act); *Matson Navigation Co.* v. *United States*, 284 U.S. 352 (1932)

(Suits in Admiralty Act of 1920, 46 U.S.C. 30901 *et seq.*, impliedly withdrew Tucker Act jurisdiction). In light of the specific and comprehensive scheme for administrative and judicial review provided for by Congress in the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, the court of appeals correctly concluded that petitioner's claims were within the exclusive jurisdiction of the D.C. Circuit.

2. Petitioner argues (Pet. 10) that the decision of the court of appeals conflicts with various D.C. Circuit decisions that "ha[ve] recognized that federal agencies' licensing decisions may be lawful as administrative matters while at the same time implicating claims against the Federal government for money damages." Petitioner's claim of a circuit conflict is incorrect. Several of the cases petitioner cites did not involve the FCC. See *Wisconsin Valley Improvement Co.* v. *FERC*, 236 F.3d 738 (D.C. Cir. 2001); *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd *sub nom. New York* v. *FERC*, 535 U.S. 1 (2002). The other cases involved challenges to FCC rulemakings (reviewable under Section 402(a)), not to licensing decisions (reviewable under Section 402(b)). Although the D.C. Circuit observed that the petitioners in each case were free to present Tucker Act claims to the Court of Federal Claims, those statements shed no light on the interpretation of Section 402(b), which was not at issue. See *Northpoint Tech., Ltd.* v. *FCC*, 414 F.3d 61, 64, 76 (D.C. Cir. 2005); *Bell Atlantic Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1443, 1445 n.1 (D.C. Cir. 1994); *Building Owners & Mgrs. Ass'n Int'l* v. *FCC*, 254 F.3d 89, 91, 100-101 (D.C. Cir. 2001). Petitioner's suggestion (Pet. 12) that "the D.C. Circuit does not read the Communications Act as divesting the Claims Court of jurisdiction over license-

related takings and contracts claims" is therefore unfounded.

3. Petitioner also contends (Pet. 13-14) that the D.C. Circuit's exclusive jurisdiction over FCC licensing decisions provides the FCC with a "unique immunity" from contract and takings claims, and that Congress could not have intended to create such a "jurisdictional void." That argument lacks merit.

Despite the characterization of its action as a breach by the FCC of an implied-in-fact contract—or as a taking of property without compensation—that would otherwise be cognizable under the Tucker Act, petitioner's specific argument in the Court of Federal Claims was the same as the argument it had made before the D.C. Circuit: that the FCC had failed to comply with its own rules regarding the requirement that bidders file a family media certification. As the Court of Federal Claims noted in dismissing petitioner's complaint, petitioner "argued to the D.C. Circuit, as it does here, that the family media certification was required and because it was not timely filed, Liberty's license application should not have been granted. The difference between the two cases is the remedy sought." Pet. App. 25a. Petitioner does not dispute (Pet. 3) that it challenged, albeit unsuccessfully, the FCC's alleged violation of its auction rules before the D.C. Circuit. Petitioner cannot reasonably argue that it was precluded from vindicating its ostensible contract or property rights, since the exact arguments it wishes to raise have already been adjudicated in the court of appropriate jurisdiction. See *id.* at 14a.

In any event, petitioner has not shown that an FCC violation of its own auction rules would have constituted a breach of contract or a taking of property. Petitioner was not the high bidder in the auction for the Biltmore

Forest license, and it has identified no authority suggesting that an FCC licensing auction results in a contract between the FCC and *unsuccessful* bidders. Nor has petitioner shown that it had any property interest in the outcome of the auction; indeed, petitioner conceded in the court of appeals that the complaint in this case does not present a takings claim. Pet. App. 16a-17a. An FCC license does not confer property rights on the license holder. See 47 U.S.C. 301; *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). It follows *a fortiori* that an unsuccessful bidder for such a license has no property interest in the auction.

4. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle for considering it. After concluding that it lacked subject-matter jurisdiction, the Court of Federal Claims went on to hold, in the alternative, that "summary dismissal as a matter of law is appropriate" because petitioner was effectively attempting to advance a "garden variety" bid protest that could succeed only if the FCC's actions were arbitrary and capricious. Pet. App. 39a, 47a. The D.C. Circuit had already determined that the agency's actions were not arbitrary and capricious, and the Court of Federal Claims held that petitioner was precluded from relitigating that issue. *Id.* at 47a-51a. Although the court of appeals had no occasion to consider that holding, *id.* at 17a n.4, it is an independent ground that would prevent petitioner from obtaining relief in this case even if it were to prevail on its jurisdictional argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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